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January 25, 2011

VIA FEDERAL EXPRESS

Lester A. Heltzer, Executive Secretary National Labor Relations Board 1099 14th St. N.W. Washington, D.C. 20570-0001

> Re: SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338 Case No. 16-RC-10963

Dear Mr. Heltzer:

In connection with the above-referenced matter, enclosed please find an original and eight (8) copies of SuperShuttle DFW, Inc.'s Brief in Response to Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*.

Please file stamp a copy of the Brief and return to the undersigned in the self-addressed, stamped envelope provided herein. Thank you.

Sincerely,

Patrick R. Scully

PRS:mam Enclosures

cc: SuperShuttle DFW, Inc.

Martha Kinard, Regional Director

NLRB Region 16

Daniel M. Combs, Esq.

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NLRB ORDER SECTION

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUPERSHUTTLE DFW, INC. d.b.a. SUPERSHUTTLE DFW,

Case No. 16-RC-10963

Employer,

and

AMALGAMATED TRANSIT UNIT LOCAL 1338,

Petitioner.

SUPERSHUTTLE DFW, INC.'S BRIEF IN RESPONSE TO BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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I. INTRODUCTION

Respondent, SuperShuttle DFW, Inc., d.b.a. SuperShuttle DFW ("SuperShuttle DFW" or "Respondent"), submits this Brief in Response to the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") as *Amicus Curiae* (the "*Amicus* Brief"), and in support of the Regional Director's well-reasoned and correct Decision and Order dismissing the Petition ("Decision," issued 8/16/1, attached as Exhibit A to Respondent's 11/12/10 Brief on Review).

As SuperShuttle DFW stated in its Brief on Review filed on November 12, 2010 and incorporated herein by reference, the stated reason upon which review of the Decision was granted—namely, the matter "raises substantial issues warranting review" (Order dated 11/1/10)—is not a basis for review set forth in the Rules. See RR § 102.67. Moreover, SuperShuttle DFW previously has submitted its Brief to the Regional Director ("Respondent's Post-Hearing Brief," Exhibit B to Brief on Review) and Statement in Opposition to Request for Review ("Response to Request for Review," Exhibit C to Brief on Review), which, along with the Decision, dispense with any contention that the factual record or pertinent governing authority warrant reconsideration of the Decision.

The AFL-CIO in fact does not appear to contend that the factual record warrants reconsideration of the Decision under pertinent governing authority. Rather, the AFL-CIO shows a complete disregard for the undisputed record, making flippant mischaracterizations and fabricating purported "facts" that are not found in the record and contradict the undisputed evidence. For example, the AFL-CIO asserts that franchisees working with SuperShuttle DFW

are unable to solicit customers and enjoy entrepreneurial freedom only in so far as they choose how hard and how skillfully they work. Contrary to these assertions, undisputed testimony demonstrates that franchisees may and do solicit customers and control nearly every aspect of their business.

The AFL-CIO also disregards legal authority in a transparent attempt to have the Board set aside governing Board and Supreme Court law. Specifically, the AFL-CIO relies primarily on a draft of the Restatement Third of Employment Law, to which no federal court or administrative agency has ever cited.²

II. SUMMARY OF PORTIONS OF RECORD REGARDING ENTREPRENEURIAL FREEDOM OF FRANCHISEES.³

A. The Record Evidence Demonstrates That Franchisees Enjoy Nearly Unlimited Entrepreneurial Opportunity for Gain and Loss.

This matter came before Hearing Officer Darci B. Slager ("Hearing Officer Slager") of the NLRB, Region 16, on July 28 and 29, 2010. All franchisee witnesses testified at the Hearing that they self-schedule in every meaningful respect. They may choose to participate in a "hotel circuit" (Tr. 64:3–64:17), and those who do so devise and police their own schedules for picking up hotel circuit passengers. (Id. 64:12–23, 124:15–125:4.) Franchisees also determine how many hours to work, and they have no obligation to SuperShuttle DFW to work any particular number of hours per week. (See Tr. 80:12–14, 116:16–117:2, 223:14–24.)

¹ Respondent's Post-Hearing Brief and Response to Request for Review are incorporated herein by Reference to this Brief.

² The AFL-CIO includes <u>BWI Taxi Management</u>, <u>Inc.</u>, Case No. 5-RC-16489 in its caption. That case is not consolidated with the instant matter and is not addressed herein.

³ The AFL-CIO's *Amicus* Brief primarily attempts to challenge franchisees' entrepreneurial freedom. SuperShuttle DFW accordingly summarizes portions of the record regarding entrepreneurial freedom of franchisees.

Franchisees also choose what work to perform in any particular day. They testified that they may "pass" or "play"—that is, accept or decline—on any bid offered, without any repercussions to them. (Tr. 57:12–22, 121:25–122:22.) In determining how to operate their businesses and whether to make certain trips, franchisees take into account considerations such as gas mileage, distance, and most importantly, revenue opportunity. (Id. 122:17–24, 301:13–302:12.)

Franchisees' businesses are most aptly described as entrepreneurial endeavors.

Franchisees determine whether to run their businesses as corporate or sole-proprietorship models. (See 49:25–50:2.) Indeed, at the time of the Hearing, five franchisees working with SuperShuttle DFW—Kwapgram Inc., Nahome LLC, Omidee LLC, O Sattiy LLC, and Surafel LLC—had incorporated as business entities. (E. Ex. 4; Tr. 48:13–50:4.)

Franchisees may increase their revenue stream by hiring so-called "relief drivers," who are shuttle drivers and employees of the franchisees. (E. Ex. 2 at 10 § 4.C; Tr. 51:9–19, 193:4–18.) It is undisputed that the decision to hire a relief driver is wholly within a franchisee's discretion. Moreover, it is undisputed that a franchisee is free to design his or her business model so that relief drivers perform all driving for the franchise.⁴

Franchisees own all significant tools of their businesses. They own—whether through straight-ownership or a lease arrangement—the vans that are the primary instrumentality of their business. The investment is significant, as vans cost approximately \$30,000. (Tr. 67:24–25.) Franchisees pay for driver permits and van permits required to operated shared-ride services, and pay toll fees and airport access fees associated with their business. (Tr. 67:1–15, 149:2–4,

268:12–17.) Further, franchisees pay SuperShuttle DFW a flat weekly fee in exchange for use of SuperShuttle DFW's auto dispatch system and trade marks and trade dress. (E. Ex. 1 at 1 § A, 3 § 1; Tr. 159:9–23).

Franchisees' complete discretion presents them with opportunity for gain and for financial loss; it is undisputed that depending on how a franchisee operates his or her business, he or she may lose money. (Tr. 263:13–19.)

Additional pertinent facts elicited at the Hearing are set forth in SuperShuttle DFW's Post-Hearing Brief and Response to Request for Review. As set forth in the Response to Request for Review, the material facts in this case are undisputed and were conceded by all of Petitioner's witnesses.⁵

B. The AFL-CIO Misstates the Record.

The AFL-CIO's description of franchisees' business is conclusory and inaccurate. By way of example only, the AFL-CIO states without any explanation that franchisees do not function as independent businesses while performing work with SuperShuttle DFW. (*Amicus* at 10.) This unsupported assertion is belied by the undisputed record. As stated above, franchisees undisputedly may incorporate, hire relief drivers, and may operate their businesses as they

⁴ Such a decision is not one about how "hard one wants to work," it demonstrates independent design of the manner of conducting business.

⁵ For example, franchisee Gideon Okwena provided unchallenged testimony regarding his entrepreneurial freedom: he testified that he does not have a schedule with SuperShuttle DFW, but sets the times he will drive his van (Tr. 116:16–19); "[He] can work two hours" or he "can work ten hours if [he] want[s] to" (id. 116:20–22); Mr. Okwena testified that no one tells him when to take a break or whether he *should* take a break (Tr. 117:5–8); and Mr. Okwena could not provide a definitive answer as to how many hours he works on a "typical" day, because (1) he does not work a "typical" day, and (2) he does not "count hours at work" (in part because he is not paid by the hour). (Tr. 145:11–146:13.)

choose—including working when they want, passing or playing on fares offered, and running their business 24-hours a day.

The AFL-CIO also falsely argues that "drivers are prohibited from soliciting their own passengers." (*Amicus* at 11.) Neither the citation AFL-CIO provides (Decision at 15), nor any part of the record, supports this assertion. To the contrary, it is undisputed that franchisees have significant opportunities to solicit passengers in their businesses, as they acquire walk-up, curbside business from customers at the airport and elsewhere. (Tr. 68:23–69:7.)

The AFL-CIO further falsely argues that franchisees "can only use their vehicles to accept trips dispatched to them by SuperShuttle." (*Amicus* at 13–14.) There are no such limits on franchisees' use of vans. Franchisee Gideon Okwena testified that he owns the van that he drives, that he uses it for personal uses, and that he—not SuperShuttle DFW—sets limits on where he drives his van and how he uses it.⁶ (Tr. 119:24–121:3.)

III. RELEVANT PROCEDURAL BACKGROUND.

On November 1, 2010, the Board granted Petitioner's Request for Review. On November 12, 2010, SuperShuttle DFW submitted its Brief on Review to Sustain Dismissal of Petition.

On December 22, 2010, the AFL-CIO filed its *Amicus* Brief with the Board. The AFL-CIO subsequently filed a Motion for Leave to File a Brief, *Amicus Curiae* (the "Motion for Leave"). On January 12, 2011, the Board issued an Order granting the AFL-CIO's Motion for Leave and directing responses to be due on or before January 26, 2011.

5

⁶ Franchisees also are permitted to run charters. (Tr. 258:22-23.)

IV. ARGUMENT AND AUTHORITIES.

A. The Substantial Record of Entrepreneurial Opportunity Supports the Decision That Franchisees Are Independent Contractors.

As set forth above, the Union boldly misstates the facts, and in so doing, disregards the significant record of franchisees' entrepreneurial opportunity. The record of entrepreneurial opportunity establishes franchisees are independent contractors under pertinent and governing authority.

Entrepreneurial freedom is a significant consideration under the common law agency test, Dial-A-Mattress Operating Corporation, 326 NLRB 884, 893 (1998), and is a fundamental characteristic of the business arrangement in the instant case. See Ace Cab Company, 273 NLRB 1492, 1493 (1985). The Board in Ace Cab described an arrangement nearly identical to the instant case as an "entrepreneutrial [sic] endeavor by the drivers rather than an employment relationship." Id.

Franchisees' business are an entrepreneurial endeavors because the franchisees generate their own income. (Tr. 117:11–14.) Franchisees have no guaranteed income (see id.), and place themselves at financial risk of loss by engaging in their own business. As in Ace Cab, 273 NLRB at 1493, franchisees independently make business decisions such as whether to "pass or play" on any bid. (Id. 54:14–34.)

⁷ In discussing entrepreneurial opportunity, the AFL-CIO relies almost exclusively on the Restatement Third of Employment Law. (*Amicus* at 12.) As set forth below, the AFL-CIO's reliance on the incomplete Restatement Third of Employment Law is improper. However, franchisees exercise entrepreneurial control over the manner and means of their work even under the test urged by the AFL-CIO, as they may hire (and do hire) and fire their own drivers, and have control over other significant business decisions.

Moreover, the Board has repeatedly found that the franchisees' authority to hire is significant evidence of entrepreneurial opportunity. Arizona Republic, 349 NLRB 1040, 1044 (2007) (finding that carriers had entrepreneurial freedom because they could hire substitutes, could solicit customers, and could enter into contracts in a corporate name); see also Dial-A-Mattress, 326 NLRB at 892–93 (stating that "[a]nother indicator of independent contractor status is the owner-operators' extensive control over their drivers and helpers"). Franchisees undisputedly have such authority. (Tr. 196:23–197:1.) Contrary to the AFL-CIO's argument, the number of franchisees who had chosen to exercise such authority at the time of the hearing is beside the point. FedEx Home Delivery v. NLRB, 563 F.3d 492, 502 (D.C. Cir. 2009). As the Board has stated, "[t]he fact that many carriers choose not to take advantage of . . . opportunity to increase their income does not mean that they do not have the entrepreneurial potential to do so." Arizona Republic, 349 NLRB at 1045.8

Franchisees' discretion to form their own corporate entities (Tr. 49:25–50:2), is yet another indication of entrepreneurial freedom, <u>Arizona Republic</u>, 349 NLRB at 1044, as is their ability to design and operate under any number of business models. Similarly, franchisees' filing taxes for themselves, reporting themselves as "self-employed," and taking business-related deductions evidences both their intent that they are independent contractors and that they take advantage of their independent contractor status. (Tr. 144:13–17, 213:18–24, 262:16–25).

The AFL-CIO disregards all pertinent authority aligning entrepreneurial opportunity with independent contractor status. The Regional Director properly recognized that the petitioned-for

⁸ In any event, it is undisputed that franchisees hire and use relief drivers. (See Tr. 51:6–19, 270:23–271:3.)

franchisees' business is fundamentally an entrepreneurial endeavor in which they alone bear the potential for gain or loss of their investment. The entrepreneurial nature of franchisees' business compels a finding that franchisees are independent contractors.

B. The AFL-CIO Argues Inapplicable Legal Standards.

1. <u>The AFL-CIO Improperly Relies on Non-Applicable Independent</u> Contractor Tests.

Like Petitioner, he AFL-CIO asks the Board to set aside the common-law agency test for determining independent contractor status. (*Amicus* at 2–4.) The AFL-CIO suggests that the common-law test, as set forth in Restatement (Second) of Agency § 220, is dated and somehow inadequate for purposes of the franchise model chosen by SuperShuttle DFW and franchisees. The AFL-CIO casually discards the common-law test by referring to the purportedly "quaint terminology" of the governing independent contractor test, which is set forth in the Restatement (Second) of Agency § 220. (Id. at 2.) The AFL-CIO also relies primarily on an incomplete and legally inconsequential source: the Restatement Third of Employment Law. (See id. at 3, 11.)

The AFL-CIO's attempt to set aside the common-law agency test is misplaced. The Board has no authority to abandon or alter the common-law agency test as set forth in Restatement (Second) § 220, let alone do so in favor of the AFL-CIO's unclear and result-driven "test."

a. The Board's Limited Mandate Prevents the Board From Abandoning or Altering the Common-Law Agency Test.

The AFL-CIO relies almost exclusively on its incomplete and unrecognized independent contractor test. (See *Amicus* at 3.) Like Petitioner's Brief on Review, the AFL-CIO's citation to

non-governing authority is an improper attempt to have the Board adopt inapplicable standards and abandon the common law test for independent contractor status described in <u>Dial-A-Mattress</u>, 326 NLRB at 890–91, <u>Roadway Package System</u>, <u>Inc.</u>, 326 NLRB 842, 850 (1998), and their progeny.

The Board has a limited statutory mandate over "employers" and "employees," and thus has no authority over independent contractors pursuant to Congress's explicit exclusion of independent contractors from the definition of "employees" under Section 2(3) of the Act.

29 U.S.C. § 152(3); FedEx Home Delivery, 493 F.3d at 496 ("[T]he line between worker and independent contractor is jurisdictional—the Board has no authority over independent contractors"); see also Yellow Cab, Inc., 179 NLRB 850, 851 (1969) (finding that a determination of employee status under Section 2(3) established the Board's jurisdiction).

Congress has directed the Board and Supreme Court that only the common law of agency test may determine employee and independent contractor status. See FedEx Home Delivery, 563 F.3d at 495–96; see also St. Joseph News Press, 345 NLRB 474, 478 (2005). It is now a "'well established' principle" that "when Congress has used the term 'employee' without defining it, [the Supreme Court] has concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine." National Mutual Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992). The Board also has stated that "Supreme Court precedent 'teaches us not only that the common law of agency is not the standard to measure

⁹ Petitioner asks the Board to abandon the common-law agency test in favor of an economic realities test. (Petitioner's Brief on Review at 2.)

employee status but also that [the Board has] no authority to change it." St. Joseph News

Press, 345 NLRB at 478 (emphasis in original) (quoting Roadway Package, 326 NLRB at 849).

b. The AFL-CIO Improperly Relies on the Restatement Third of Employment Law.

Not only does the Board lack authority to alter the common-law agency test, <u>St. Joseph</u>

News Press, 345 NLRB at 478, but no authority exists to adopt the flawed "test" on which the AFL-CIO relies.

With no apparent purpose other than to obtain a different outcome, the AFL-CIO relies primarily on the Restatement Third of Employment Law (*Amicus* at 3, 11), which is a tentative draft of a Restatement project of the American Law Institute ("ALI"). (http://www.ali.org/ (follow projects, current project, Restatement Third, Employment Law).) Even if the Board was planning to defy the Supreme Court and Congress and alter its independent contractor test, the Restatement Third of Employment Law does not govern for several distinct reasons. As an initial matter, Restatements of Law have no precedential value in and of themselves. As legal treatises, restatements are influential only insofar as the Board or courts adopt their provisions. The Supreme Court and Board, for instance, have expressly held that the applicable common-law agency test is set forth in Restatement (Second) of Agency § 220. See Arizona Republic, 349 NLRB at 1042. No court or agency has cited to the Restatement Third of Employment Law on any subject, and it cannot reasonably be described as influential on the subject of independent contractor status.

¹⁰ A detailed analysis of Congress's and the Supreme Court's adoption of the common-law agency test as the standard to define employee status is set forth in SuperShuttle DFW's Brief on Review, at pages 7–9.

¹¹ The AFL-CIO also improperly relies on the Restatement (Third) of Agency Law (*Amicus* at 2), which has not been recognized or adopted by the Board.

Finally, the Restatement Third of Employment Law is incomplete. The American Law Institute, which publishes the Restatements, acknowledged that the Restatement Third of Employment Law is a project that "is likely to last several more years before completion."

(http://www.ali.org/ (follow projects, current project, Restatement Third, Employment Law).)

Given the incomplete and inconsequential status of the Restatement Third of Employment Law, the Board should reject the AFL-CIO's efforts to adopt its provisions.

2. <u>The AFL-CIO Improperly Asks the Board to Misapply Board Law</u> Concerning Employer Control and Government Regulations.

The AFL-CIO also attempts to obfuscate a clear and long-standing axiom of independent contractor decisions under Section 2(3) of the Act—that rules and requirements imposed on drivers by government-imposed regulations do not constitute control by a company. See Don Bass Trucking, Inc., 275 NLRB 1172, 1174 (1985) (setting forth rule); (Amicus at 13). The AFL-CIO improperly asks the Board to add an element to the analysis—a requirement of privity of contract between the governing authority and the purported employee. (Amicus at 13.) Such a required element would disregard Board authority and undermine the axiom itself, which provides that methods of doing business resulting from government regulations affect all individuals in an industry and should not be designated as employer controls for purposes of determining employee status.

As an initial matter, the AFL-CIO misidentifies the rule by referring to it as "the D.C. Circuit's rule." (*Amicus* at 13.) In fact, the *Board* has long recognized and applied the rule.

Don Bass, 275 NLRB at 1174; see also Ace Cab Company, 273 NLRB at 1493 (finding that "[m]ost of the rules under which the drivers operate[d] [were] dictated by either insurance or city requirements").

The AFL-CIO also glosses over the proper context of the rule. The rule is a principle within the "control" factor of the common-law agency test. Arizona Republic, 349 NLRB at 1042. That is, although a purported employer's control over the manner and means of work is a consideration, the Board and federal courts have determined that "control" means only certain types of control. See FedEx Home Delivery, 563 F.3d at 497. Specifically, "restrictions resulting from government regulation," (among other types of purported control) are fully compatible with independent contractor status. Id. at 496–97.

To the extent the AFL-CIO asserts that an independent contractor must be *directly* regulated by a government authority—put differently, that contractual privity must exist between the purported employee and the government authority—the AFL-CIO asks the Board to overrule Board precedent. (See Amicus at 13.) No decision has required that a government authority "regulate [purported employees] directly," as the AFL-CIO argues (Amicus at 13), in order for such regulations to be found immaterial under an independent contractor analysis. To the contrary, the Board repeatedly has applied the rule where a government authority's regulations are applied through the purported employer. Thus, in Air Transit, Inc., 271 NLRB 1108, 1111 (1984), the Board held that where all factors allegedly demonstrating control over the manner and means of drivers' performance of their duties, including, but not limited to, preset fares, radio-equipment requirements, stemmed from requirements imposed by an FAA contract with Air Transit, no evidence of employer control existed. Id.; see also AAA Cab Services, Inc. and Independent Taxi Drivers Union, 341 NLRB 462, 465 (2004) (finding that "governmentally

 $^{^{12}}$ In any case, the regulations cited in this matter <u>do</u> regulate franchisees directly, regardless of how the AFL-CIO mischaracterizes them.

imposed rules such as those associated with the posting of fares [set by the employer] do not evince the level of control by an employer to preclude independent contractor status").

The <u>Don Bass</u> rule properly applies in the instant case. Purported control over franchisees comes exclusively from extensive government regulations over the shared-ride transportation industry. (See Decision at 15–16.) Such rules include Airport regulations concerning the make, model, age, and appearance of vans. (Decision at 16.) Other regulatory requirements include uniforms, recordkeeping, and submission of vehicles for inspection. (E. Ex. 1 at 6–7 § 1.1.32; Ex. 2 at 5–6 § 2.D; E. Ex. 1 at 24–26; E. Ex. 1 at 50–51.) These rules are all mandated by the DFW Airport Authority. Under current law, these factors cannot favor a finding of employee status. Were franchisees to operate under a different trade name, they would be subject to the same Airport Board rules. The AFL-CIO's assertion that SuperShuttle DFW's contract with the Airport Board somehow makes SuperShuttle DFW responsible for Airport Board regulations is factually disingenuous and contrary to Board precedent.

V. CONCLUSION

For all of the reasons set forth above and for the reasons set forth in Respondent's Post-Hearing Brief, Response to Request for Review, and the Regional Director's Decision, the dismissal of the Petition based on franchisees' status as independent contractors must be sustained and the AFL-CIO's requested disavowal of the Board's common-law agency independent contractor test must be rejected.

Respectfully submitted this 25th day of January, 2011.

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CERTIFICATE OF MAILING

I hereby certify that on January 25, 2011, a true and correct copy of the foregoing SUPERSHUTTLE DFW, INC.'S BRIEF IN RESPONSE TO BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE was served to the following by Federal Express:

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